IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

JEANETTE WILKES, DAUGHTER OF ANDERSON SMITH, DECEASED, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND THE ESTATE OF ANDERSON SMITH, DECEASED PLAINTIFFS

V. CIVIL ACTION NO. 91-123-55-(B)(W)

THE AMERICAN TOBACCO COMPANY AND THE NEW DEAL TOBACCO AND CANDY COMPANY, INC. DEFENDANTS

VOLUME IV
TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED that on Wednesday June 9, 1993, at the Washington County Courthouse, 1024 Washington Avenue, Greenville, Mississippi, the following proceeding were had and done before Judge Bogen, beginning at 9:14 a.m.

APPEARANCES:

DON BARRETT, ESQ.
FRED CLARK, ESQ.
VICTOR MCTEER, ESQ.

COUNSEL FOR PLAINTIFFS

JAMES E. UPSHAW, ESQ.
BRUCE G. SHEFFLER, ESQ.
TOM BEZANSON, ESQ.
JOHNNIE WALLS, ESQ.

COUNSEL FOR DEFENDANT, THE AMERICAN TOBACCO COMPANY

J. MURRAY AKERS, ESQ.

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OPENING STATEMENTS
DR DAVID BURNS
(DIRECT AND PART OF CROSS)



THE FOLLOWING PROCEEDINGS WERE HELD IN OPE COURT OUTSIDE THE PRESENCE OF THE JURY:

JUDGE BOGEN: Counsel, before we begin, do you want the stipulations contained in the pretrial order read to the jury before or after your opening statements?

MR. BARRETT: After the opening statements, Your Honor.

MR. UPSHAW: Either way is okay with us, Your Honor.

JUDGE BOGEN: All right. Now, let me say one thing to our spectators, particularly those from the press. I know you want to be able to see everything, and the courtrooms are just not very well designed so that everybody has total access to the information. The jury has got to decide the case, so they are the ones who are going to have to see matters projected on the screen, and so there will be some things you won't be able to see where you're seated, and there are too many of you for me to permit you to come around to this corner by the door, so you're going to have to remain seated, and perhaps the parties can show you copies of the exhibits, if they're so inclined, but that's the best we can do under the circumstances.

MR. UPSHAW: May I ask you this: Are you lifting the order of not disseminating information by



counsel during trial or are we still under --

JUDGE BOGEN: For the purpose of distributing copies of exhibits, if you want to. I'm not going to require you to do so.

MR. UPSHAW: Are we still under that order until trial is over?

JUDGE BOGEN: Yes, sir. I believe we're ready for the jury.

THE FOLLOWING PROCEEDINGS WERE HELD IN OPE COURT IN THE PRESENCE OF THE JURY:

JUDGE BOGEN: Ladies and gentlemen of the jury, welcome back. We will begin this morning with opening statements by the lawyers. Keep in mind that what the lawyers have to say about the case is not evidence. The evidence will consist of testimony from the witnesses and exhibits. The opening statements are offered to explain to you what the case is about, what issues you can anticipate being developed during the trial, but they essentially contain the opinions of the lawyers as to what they believe the evidence will show.

Let me say one other thing: It's always either too hot or too cold in this courtroom. Bring a wrap, if it gets too cold, put a wrap on. If you've got one back in the jury room and need the bailiff to retrieve it for you, he can do that, but I think that's just the



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nature of air conditioning in courtrooms. It's the same everywhere I've ever been. All right. Mr. Barrett, you may proceed.

MR. BARRETT: Good morning, ladies and gentlemen. My name is Don Barrett. I'm a lawyer from over in Lexington. I'm one of the attorneys that represents Sergeant Bell and Ms. Wilkes in this case.

Yesterday, you heard one of the tobacco company lawyers tell you to loosen up, this is not all that serious. Well, this is very serious, indeed. This is a hugely serious case. It's very serious because Sergeant Bell and Ms. Wilkes lost their father. It's very serious because The American Tobacco Company spent many years in deceiving that generation of American people, and it is very serious because the people of Washington County ~~are~~ speaking through this jury, are going to have the opportunity to set a standard for corporate behavior for the entire nation.

We want to tell you right out of the box that this is a punitive damage case. The plaintiffs in this case seek damages not only because the defendants killed their daddy, but The American Tobacco Company did so in such a ruthless and malicious way that The American Tobacco Company ought to be punished, and that's the reason we are here.

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The plaintiffs in this case are Sergeant Jessie Willie Bell and Ms. Jeanette Wilkes. Both the plaintiffs were born over in Attala County, Kosciusko, Mississippi, they're the children of Anderson Smith, Jr. Ms. Wilkes is married and lives in Illinois now. Sergeant Bell had a distinguished career with the United States Air Force as a fighter pilot mechanic, a mechanic for F-15 fighter pilots, fighter planes. He retired out of the service after doing his 20 years. He went back to college and now works for the McDonald-Douglas Aircraft Company over in Saudi Arabia. Sergeant Bell has literally come halfway around the world to be in Greenville, Mississippi, to have his day in court.

Anderson Smith, Jr., was just a customer for these defendants, just a number, but he was Daddy to these plaintiffs, and they loved him. Mr. Smith was born back in 1922. He grew up in Attala County in the Kosciusko area. When World War II came, Mr. Smith joined the United States Army and served his country honorably. He left the service with a service connected total and permanent disability. Mr. Smith spent most of his life or the rest of his life back in Kosciusko. He smoked Pall Mall or Pall Mall cigarettes for more than 40 years, more than a pack a day.

These Pall Mall cigarettes manufactured and

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distributed by these defendants produced lung cancer and emphysema in Mr. Smith, and these lung diseases killed him on February 7th, 1986. The children of Mr. Smith, Sergeant Bell and Ms. Wilkes, are seeking and are entitled to recover damages because of the wrongful death of their father.

The State of Mississippi has long had a law passed by the legislature many years ago called the "Wrongful Death Act". When somebody dies through the fault of somebody else, because of somebody's defective product, our Wrongful Death Law in the State of Mississippi says the manufacturer of that defective product has to pay damages to the family.

Judge Bogen has already ruled that the defendants -- that Pall Mall cigarettes are, in fact, a defective product, but your job as a jury is simply to decide the second step, did this defective product, Pall Mall cigarettes, contribute in any way to the death of Anderson Smith. Because of Judge Bogen's rulings, this case is going to be shorter and a lot less complicated than the ordinary death case, cigarette death case.

Judge Bogen has already discussed these rulings with you, went over them with you at great length, maybe too much, yesterday in the voir dire, both sides, but we did it because they're such an important part of

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the case. And because they're such an important part of the case that the plaintiffs are going to present to you, we want to go over them very briefly again so that you can see how they fit into the big picture of what the proof will show, what we're going to show you.

First of all, as we said, this Court has already ruled that cigarettes, including Pall Mall cigarettes sold to and smoked by Mr. Smith, are "A defective and unreasonably dangerous product because ~~we knew that the cigarettes they were manufacturing they caused~~ when used as directed as intended, they cause lung cancer, emphysema and other diseases." The American Tobacco Company has repeatedly denied this. Throughout Mr. Smith's lifetime, The American Tobacco Company has loudly and frequently proclaimed that "Cigarettes are not injurious to health."

The Court has ruled in favor of Mr. Smith's family on this issue. Second, Judge Bogen has already ruled that under the facts of this case that he's seen and ruled on, Anderson Smith did not assume the risk of smoking, nor was he legally at fault in any way for choosing in smoking the defendants' product. We talked about that yesterday. So there won't be presented to you by either side any evidence as to how smart, how ignorant Mr. Smith may have been, whether he was like Einstein or whether he had the mind of a child, or what he knew, may



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have known, what he didn't know about the magnitude or dangers of cigarettes, whether he was addicted or not.

This evidence is irrelevant now, and the Court won't permit it because His Honor has decided that Anderson Smith was not legally at fault and cannot be penalized by the jury, by you, for smoking the cigarettes that they sold to him. And you've told the Court that you're going to follow that ruling of the Court, and the plaintiffs are confident that you'll do that. That's what the case is not about.

Let me tell you what the case is about, what the remaining issues are that you're going to have to decide. First of all, you must decide whether Mr. Smith had any lung disease which was caused by or contributed to by smoking Pall Mall cigarettes. Our proof will demonstrate to you very clearly that yes, Mr. Smith contracted two lung diseases, both deadly lung diseases from smoking their cigarettes, lung cancer and a disease called "Chronic Obstructive Pulmonary Disease" or COPD, or sometimes Chronic Obstructive Lung Disease, all the same thing, what we know what's commonly known as emphysema. Then you'll have to decide whether his lung cancer or his emphysema, either of them or both of them, contributed in some way to Mr. Smith's death.

The proof is going to be overwhelming that

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certainly these lung diseases contributed to his death, certainly. It did more than that. The cigarettes produced lung diseases, lung cancer and emphysema with one-two punches that caused Mr. Smith to die on February 7th, 1986. The very first proof of the real cause of Mr. Smith's death is the official death certificate on file with the State of Mississippi, certified to by Dr. Bernard Dreiling who is head of the Tumor Board at the VA Hospital in Jackson where Mr. Smith was being treated for his cancer at the time of his death. He was also one of Mr. Smith's treating physicians.

The proof will show that an official death certificate is an important document in the State of Mississippi, not to be filled out carelessly or inaccurately. And what does the head of the Tumor Board at the VA, Dr. Dreiling, officially certificate as to the cause of death of Mr. Smith, and I want to -- this is what we're going to mark and show you as evidence. This is the official certificate, what was done, so you can read it. Let's put it on this machine.

Your Honor, could these two alternate jurors sit right here? Otherwise we might have to pick it up, and you might miss it. I'm the world's worst with machinery, it probably won't work. This is the official certificate of death from the State of Mississippi's vital

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records, as you can see, Anderson Smith, Jr. The critical part of it is right here.

Bernard Dreiling is the man that signed it. It says -- it asks -- and the important thing that he figures out, the crucial thing in this lawsuit, it says, "Death caused by" -- and then it says, "Immediate cause: Squamous cell carcinoma of right upper lobe of the lung." You're going to find out from the doctors that squamous cell -- we're talking about lung cancer, lung cancer caused by cigarette smoking, there will be no question about what that is, a doctor will describe it.

And then it's got something else, it says, is there anything else, it says, "Other significant conditions - conditions contributing to death." Look what it says. Chronic obstructive pulmonary disease is emphysema, again, caused by the smoking of Pall Mall cigarettes.

There are also -- that's not the only record we're going to have, and the first thing we're going to introduce is Court's Exhibit Number 1, that's the medical record from the hospital. All the doctors looking at it will be telling you what they're about -- what those records say, but the records, as you know, the medical records are filled out on a day-to-day basis by the doctors and the nurses that were there with Anderson

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Smith, who saw him and touched him, spoke to him everyday, treated him, knew him, and then -- so they have great weight.

And then at the end, the attending physician, after the death, if a person dies, after the death, they have a discharge summary where they have to summarize what he was there for, the course of treatment and what he died from, and put what he died from right at the top. I wanted to show this to you, to blow up, we'll have the entire thing later, but it says, "List the principal diagnosis . The principal diagnosis of that condition established after study, be chiefly responsible," and so forth, and then it says, "Then in order of importance, list the other diagnoses," and you see what is the number one diagnoses? "Squamous cell," again, "squamous cell carcinoma of the right upper lobe of the lung." And these are the doctors that saw him that are not being paid by The American Tobacco Company or being asked by us, these are just the doctors that were there with him. This is what they said. Very significant.

In addition to the -- let me put this down. In addition to the overwhelming proof provided by the death certificate, itself, and his medical records, two very prominent doctors, physicians, will come before you to testify that certainly Mr. Smith's death was caused by



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the lung cancer and contributed to by the COPD or the emphysema, and that both of these diseases were produced by the defendant's cigarettes.

The first of these physicians is Dr. David Burns from San Diego, California. Dr. Burns is one of the most prominent authorities on lung cancer and chest diseases and smoking in the entire world. You probably heard of the official US Surgeon General's report on smoking and health. Dr. Burns was senior editor of several of them. He has been involved in writing chapters in every single Surgeon General's report since 1975. There is nobody any more qualified on the subject of smoking disease and lung cancer er than Dr. Burns.

The second physician testifying for the plaintiffs will be Dr. Robert O'Neal, who is chairman emeritus of the Department of Pathology at the University of Mississippi Medical Center in Jackson. A pathologist is a physician who is specially educated and trained to determine the cause of death in humans. Dr. O'Neal will be the only pathologist, the only specialist in causes of death who is going to testify. The tobacco companies do not have a pathologist to dispute Dr. O'Neal.

Both Dr. O'Neal, the pathologist, and Dr. Burns, the preeminent authority on smoking and cancer, will testify to you that this death certificate, these

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medical records, are indeed accurate. Both of them will testify that Mr. Smith had lung cancer and emphysema produced by the cigarettes sold to him, and both will explain to you how this lung cancer and emphysema caused his death on February 7, 1986.

If you believe at the end of all this evidence that it is just more likely than not that either of his cigarette produced lung diseases, that is either the lung cancer or the emphysema, so much as contributed to his death, was only a part of of reason that he died, and we're going to show you it's the whole reason he died, then your verdict will be for the plaintiffs, and that's the law that Judge Bogen will instruct you on.

His Honor will instruct you that the plaintiffs' damages include such things as medical bills related to his lung diseases there at the VA Hospital, the funeral bills, his pain and suffering, the children's loss of companionship, the net lost income, things of this nature.

We're going to offer evidence so you'll understand what we're doing. We'll be offering evidence about that as to all the various damages so that you can decide. It's your job to decide what amount or what award of actual damages would be appropriate. The defendants, we believe, will offer little or no proof against the

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plaintiffs on the damages issue.

What they're going to try to sell you -- you may have noticed that the selling job started yesterday when they were asking you questions is that neither lung cancer nor has emphysema had a thing to do with his death. Of course they have to say that. They cannot admit the death certificate is accurate or the case would be over. They're not going to admit he died of cancer, just as they have never admitted that their cigarettes cause cancer. They're going to say not lung cancer or emphysema, that it was a urinary problem or an embolus or a blood clot or whatever.

Ladies and gentlemen, that's what we call -- we lawyers call a "smoke screen", or sometimes we call it "rabbit trails". Watch for it, and don't be misled. Remember that their witnesses are tobacco company witnesses. In 1993, today, they will not admit that cigarette smoking causes cancer, that cigarettes, their American Tobacco Company killed tens of thousands of American people each year.

MR. UPSHAW: If it please the Court, I didn't think that was in this lawsuit.

JUDGE BOGEN: Counsel, let's confine the opening statement to the facts of this case.

MR. BARRETT: Watch their witnesses as we try

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to get a straight answer out of them. The proof will show that the tobacco company's witnesses are so far out of the mainstream of medical sciences that they're simply not credible on this issue. The fact is that Pall Mall cigarettes did produce the lung cancer and the chronic obstructive pulmonary disease, the emphysema, in Anderson Smith and thus cost him his life. And his children, Sergeant Bell and Ms. Wilkes, are entitled to be compensated for the damages for the loss of their father.

Now, so far, up to now, I've been talking about the compensatory damages, the actual damages part of this lawsuit. From this point on, we're going to be talking about the punitive damages part of this trial, and what we believe that the proof will show, cigarettes did cause the death of Anderson Smith's injuries as cigarettes have caused the death of literally millions of other Americans. The proof will show that American Tobacco Company's cigarettes have killed and will continue to kill tens of thousands of Americans each year.

MR. UPSHAW: He's doing it again, Your Honor. And that's exactly what you've instructed him not to do. That's not in this lawsuit.

JUDGE BOGEN: I'm going to overrule that and let him make an opening statement on his punitive damage case or claim.



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MR. BARRETT: How did they manage to get away with it? Our proof is going to show you. The proof will show that The American Tobacco Company has known for 40 years or better that cigarettes caused lung cancer and death, but they lied to that generation of Americans, including Anderson Smith, who were smoking back in the '40s and '50s and '60s, long before any warnings were on any cigarette packs, and this is the generation that is dying now from those cigarettes.

Proof will show you, ladies and gentlemen, that The American Tobacco Company knows that cigarettes kill more Americans each year than AIDS, automobile accidents, alcohol, fires.

MR. UPSHAW: If it please the Court, I want to lodge one more objection to that. I don't believe that that's proper. The American Tobacco Company is one company. He's talking about the whole industry now. The industry is not on trial.

MR. BARRETT: I'm --

MR. UPSHAW: I'm not through, Buck. We're on trial, not the industry.

JUDGE BOGEN: The objection will be overruled. You may continue.

MR. BARRETT: The proof will show you, ladies and gentlemen, that The American Tobacco Company, his

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client, knows that cigarettes kill more Americans each year than AIDS, automobile accidents, alcohol, fires, heroin, morphine, cocaine, crack cocaine, suicide, and homicide combined, all put together, and yet -- and yet they continue to lie to the American public saying that cigarettes are not injurious to health, thus assuring that their profits will continue and that the deaths will continue.

How they've gotten away with this wholesale killing is the rest of the story, and in the next two or three days, we're going to tell it to you through the witnesses, through the internal documents that we have obtained. Since the early 1950s, this defendant, The American Tobacco Company, has led, not just participated in, but led an industry, the tobacco industry, campaign to deceive the American people about the true dangers of cigarette smoke.

We're going to show that The American Tobacco Company knew by the early 1940s that cigarettes probably caused cancer, and they knew it for a fact by the early 1950s. By the fall of 1953, scientific evidence about the danger of cigarette smoking had become too overwhelming for The American Tobacco Company to ignore it.

For example, on September 10, 1953, the "New England Journal of Medicine," which is one of the most

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prestigious medical journals in the entire world, came out with an editorial saying in very strong terms that cigarettes do cause lung cancer, that a similar data had incriminated a food contaminant that was not habit forming and was not supported by the advertising of a financial empire, there is little doubt that effective countermeasures would have followed quickly. It is not the insufficiency of evidence that accounts for lack of such measures from tobacco companies.

This, ladies and gentlemen, in the fall of 1953, November of 1953, was the moment of decision. This was the crossroads for The American Tobacco Company. Unquestionably, they knew the hard, shocking truth about their product. Would they take the high road and tell the truth to the American people, say, "What have you done, Let us make it right," or would they take the low road and lie? You're going to see from our proof just as clearly as you see me standing here that they took the low road.

What The American Tobacco Company did to a whole generation of Americans, Anderson Smith's generation, beginning in November of 1953, showed a ruthless disregard for human life, and it is still going on even as we go about this trial in this courtroom.

The proof will show that the tobacco

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companies, led by The American Tobacco Company, concocted an organized scheme whereby the tobacco industry would form a committee, going to call it the TIRC, the Tobacco Industry Research Committee, to supposedly -- publicly what they said was to research and find out the truth about cigarettes. The evidence is going to show you very clearly that the real purpose was to hide the truth, was to put out false information to the public, and to make that generation of Americans believe that most scientists don't really believe this "loose talk", is what they called it, this loose talk that cigarettes cause cancer. "Don't worry," they said, part of this campaign to deceive the public.

The American Tobacco Company had a sophisticated and slick -- it was slick, advertising campaign, very subtly and falsely claimed that Pall Mall had health benefits, for Pete's sake. We would show you a few of those ads. The proof will show that this ad campaign that played on the fears of the American public who was beginning -- they were starting to read this stuff and wondering about, that played on their fears and was so phenomenally successful that Pall Mall cigarette sales rose 304 percent during the four years that they had it on.

One of the worst things that this company did



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was to direct their big lie that cigarettes are not injurious to health, to children and young people. We're going to show you, for one example, a letter that The American Tobacco Company wrote in 1955 to a school teacher in Virginia to be used in her health class, her health class, telling these impressionable young people that, "There is no evidence that cigarettes cause cancer." The proof will show that is a -- was a blatant deception, it shows and still shows their ruthless disregard for life.

The proof is going to show that The American Tobacco Company's ruthless disregard for human life was not just in the 1950s. As more and more evidence piled in, the tobacco company has continued to deny the health hazard. You will see the videotaped deposition of the long-time president of the American Tobacco Company, Robert Heimann. In that deposition, he admits that in 1954, lawyers and public relations people, not scientists or doctors, but their lawyers and the PR people concocted an official public position for the American Tobacco Company. You guessed it, "Cigarettes are not injurious to health."

And when the United States government issued the famous Surgeon General's report of 1964, which forever and for all time ended any pretense that there was any question as to whether or not cigarettes cause cancer, The

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American Tobacco Company still publicly denied any health risks and had ads saying that, "Cigarettes are not injurious to your health," and you'll see these.

And then as further studies and government reports came in in subsequent years reinforcing the truth about cancer and disease, The American Tobacco Company continued the big lie, never took any effort to undo the damage of its past falsehoods. One at a time, every major health organization in the world, in the world, made a finding that cigarettes cause lung cancer and death. The American Tobacco Company ignored them and stuck to the big lie, cigarettes are not injurious to health.

Why did they lie? Why do they lie today? The proof will show they did it and they do it for the money. The American Tobacco Company has made a fortune, beyond what I can dream of, in lies and death, including the death of these plaintiffs' father, Anderson Smith. We will ask that you award punitive damages in this case to send this arrogant company a message, "No more lies."

As I close now, I'm going to let Mr. Upshaw have it, I'm going to challenge The American Tobacco Company to begin their opening statement with a "yes" or "no" answer to this question: Do their cigarettes cause lung cancer or not? Get a simple answer. While he's at it, maybe he can explain to you why The American Tobacco

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Company thinks they can make a product that kills people and get away with it. Thank you.

MR. UPSHAW: May we move this, Your Honor?

JUDGE BOGEN: Yes, sir.

MR. UPSHAW: Could you move it, Buck? May I proceed, Your Honor?

JUDGE BOGEN: Yes, sir.

MR. UPSHAW: Ladies and gentlemen, you've seen me coming in and out of the courtroom for the last couple of days. Now you're going to have to put up with me a little bit more for the next several days, I anticipate, as you know, what we call the voir dire examination, picking a jury. You've been on the hot seat here for a couple of days. You've been asked just about everything that you've ever done, everyone you're kin to, where you've ever worked and what thoughts you've ever had in your life. But now -- and Mr. Barrett just did it -- we've actually started this lawsuit, what we're really here all about.

The opening statements will be concluded after I get through, and we're going to get on with the lawsuit. Mr. Barrett issued a challenge to me right there at the end. That was a very impassioned plea that Mr. Barrett has made to you. He has no credible or believable proof whatsoever, and you will readily see that

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as we go through this lawsuit to prove these scurrilous accusations that he's made against The American Tobacco Company and the American tobacco industry as a whole.

The challenge that he made to me to give you a "yes" or "no" answer is not an issue in this lawsuit. It's not for me to determine, it's not for Mr. Barrett to determine. This gentleman setting right up here with the robe on, The Honorable Eugene Bogen, the judge in this lawsuit, has already made a determination of that question.

The question in this lawsuit is how or what caused Mr. Anderson Smith, Jr., the man that died back in 1986 in the Veterans Administration Hospital in Jackson, Mississippi, what caused his lung cancer, what caused his chronic obstructive pulmonary disease, and you will hear that referred to throughout this lawsuit as COPD. You know, doctors are real good at that, they use initials or abbreviations for just about everything, like AIDS or whatever, EKG, you know, for electrocardiogram, and COPD is -- and you will hear it throughout this lawsuit, chronic obstructive pulmonary disease.

Now, I got a little bit ahead of myself making those few opening remarks, but I'm Jim Upshaw. I'm a lawyer, been practicing law in Mississippi for about 35 years. I'm the senior member of the law firm called



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Upshaw, Williams, Biggers, Page and Kruger. I live in [DELETED] My family is [DELETED] I'm married to a girl who's sitting out here in the audience. She's not a girl any more, she's almost as old as I am. But anyway, I've been living [DELETED] many, many years practicing law there, organized this firm, and we now have offices in [DELETED]

We have 28 lawyers, and I'm not going to attempt to give you the names of all of them. We practice in this area quite frequently, but none of you had ever heard of me or didn't any of you hold your hands up to say you did, so I must not have been doing too well over here. But anyway, we do practice in Washington County quite frequently, we do a lot of medical malpractice defense work. We are what's known as a defense firm. We defend civil lawsuits.

I am privileged to be here today representing not a ruthless client, as Mr. Barrett would have you believe, not Beelzebub or the Devil, himself, but one of the better corporate concerns in America, which is The American Tobacco Company. I'm not the only lawyer that represents The American Tobacco Company. Mr. Walls here, Johnnie Walls from the Walls Law Firm here in Greenville, Mississippi, and you've been seeing a lot of him now for the last couple of days, and you're going to continue to

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see a lot of Mr. Walls, he's not through. But anyway, as you know, he did the voir dire. We call the examination that you suffered through yesterday the voir dire examination, and Mr. Walls did that on our behalf. He is here today, along with me, representing The American Tobacco Company.

We have a third lawyer who is what we -- I guess Johnnie and I are what you call Mississippi counsel, we're the local people. We have an attorney, Mr. Sheffler, right here. This is Bruce Sheffler. Mr. Sheffler is with the law firm of Chadbourne and Parke of New York City, and they've been national counsel for American Tobacco Company for more years than any of you probably have ever been born. They've been representing this company for many, many years. He's national counsel. He is here, he will participate in this lawsuit at our invitation. He has a right to do that, and hopefully, you will treat him as well, even though he's a Yankee, as you will treat me and Mr. Walls.

The New Deal Tobacco and Candy Company is also a defendant in this lawsuit. A lot of you know this guy. This is Murray Akers. Murray lives [DELETED] His wife's named Pat, and he practices law here, has practiced here for many years. He was assistant district attorney for many years, used to be with Sonny Meridith,

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the Robert, Shaw, Meridith firm when they were together. He's on his own now, he's an individual practitioner.

He represents, as I said, New Deal Tobacco and Candy Company, which is a Greenwood company but does business in Greenville. It was a company that was owned by Sammy Casio and his family during all times relevant to what we're concerned with here today, and it was a company -- and the reason I say it was a company, they -- after the father and mother died or- - too many children involved and the business went out of business because it couldn't support the number of people it had in it, but it distributed tobacco products during the period that we're concerned with here.

It also distributed what they call "notions", three or four thousand different products, candy, everything, everything you can imagine. I think some of you people -- I think maybe you might have been the gentleman maybe that worked for them or knew something about it at one time. But anyway, as I say, the family, the Casio family operated this business for 40 or 50 years, and then it was turned over to their sons, Charles, who everyone called "Baby Brother," and Anthony and John Casio and the widow -- Sam's widow, and about two years ago, they all went into other businesses.

Bob Oliver here, mean old Bob Oliver, sitting

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-- distinguished gentleman with the gray hair sitting here on the front row is here on behalf of The American Company as our corporate representative. He is American Tobacco Company's senior employee in the State of Mississippi. That's the reason he's here. He's been with us -- and I'm going to refer to my client, if you don't mind, as "Us". I sometimes get tired of saying the "defendant" or "The American Tobacco Company". When I say "We" or "Us", I mean The American Tobacco Company.

He's been with us 27 years, he lives in [DELETED] and he is the district sales manager for us, for The American Tobacco Company. Its territory covers a very large portion of the State of Mississippi, and it included Washington County here in Greenville until a couple of months ago. He no longer has this territory, but he did for many, many years.

There is a purpose in the law, and I know you're not going to understand a lot of things that we lawyers do, but believe it or not, over many, many years, starting all the way back with the Magna Carta, 900 years ago in England, there is a reason why we lawyers do many of the things that we do. I'm doing one of them now; Mr. Barrett just did it. This is called an opening statement. This is not evidence; this is not proof.

I've seen a few of you taking notes, maybe



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they were notes just who we are so you'll remember us, but I'm not putting on any proof, I'm not proving anything. I'm merely telling you what this lawsuit is about, and exactly Mr. Barrett did the same thing. Nothing Mr. Barrett has said is to be considered proof, and I've got a challenge for him, by the way. He wanted to challenge me. Y'all see if he proves what he said he was going to prove. Really, really, really, really look for that.

Now, this is my opportunity, though, on behalf of my client, The American Tobacco, to inform you, as clearly as I can, of our position in this lawsuit and to thereby attempt to help you more easily follow the proof, and the proof is the evidence that will be introduced or that you will hear from the witness stand, and that proof not only will have the oral testimony, spoken testimony, but it will contain exhibits like this thing he showed you up on the board, I mean, up on the screen, whatever you want to call it. It will be -- demonstrative aids will be used. I've got a few over there that I'm going to show you in a minute.

Incidentally, as I move along, let me get this up here so I can show it to you. I'm attempting now to assist you to easily follow the proof as it develops from the witnesses, from the witness stand, and I'm trying as

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well as I can to alert you in this trial of the important issue or issues, and those are the things that you will eventually determine, and only you will determine, Mr. Barrett nor I nor Mr. McTeer nor the Judge will determine.

The Judge will give you the law that is applicable, which you're charged to follow. Whether you like that law or not, that makes no difference, you have to follow that law, but you will go back, and you will take all the evidence we give you, all of the things you hear, all of the things you take with you, the exhibits, and you will deliberate and consider. And the one thing you won't leave out here in this jury box is your horse sense and your common sense, you're going to use that also in this lawsuit.

Let me tell you what the case is really about. Mr. Barrett has told you, frankly, of an impossible burden that he's taken upon himself. He's told you how graphically and clearly he's going to prove many, many things to please look for because the proof's not going to be there. Some things he told you are clearly true. It's about Mr. Anderson Smith, Jr., who was the father of Sergeant Bell and Ms. Wilkes back here, Jeanette Wilkes of Chicago. Mr. Bell, contrary to what Mr. Barrett told you, does not live in Saudi Arabia, Mr. Bell lives in

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[DELETED] and is a civilian employee for a company and is now working in Saudi Arabia.

You've had members of your families or friends who have worked overseas, but I think Mr. Bell will tell you when he gets on the stand that he and his family and his children live in Rialto, California. That's where I took his deposition. I went out there and took his deposition some time ago. That's where he said he lived. He's lived all over the world, by the way. He did honorably spend 20 years or more the U.S. Air Force and lived all over the world.

Mr. Smith, their father, as Mr. Barrett said, was a 63 year old black gentleman who lived most of his life in Kosciusko, Mississippi, which is Attala County, over east of Durant, east of Lexington. I think most of you know exactly where it is. Sallis is a little town between Durant and Kosciusko. He lived there. And the proof will show that neither of these plaintiffs lived -- they lived very little -- I don't think Mr. Bell ever lived with Mr. Smith, and Ms. Wilkes may have been there a little while, but I don't think she ever really lived with him.

This case also involves history, ladies and gentlemen. It involves, among other things, the history of Mr. Smith's life, not just the last or the terminal

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episodes of Mr. Smith's life, but it involves the history of his life, starting -- we're going to start back around 1938 when he first started having urinary problems, and it goes from there up until his passing away at the Veterans Administration Hospital in Jackson on February 7th, 1986, at or around 5:30 a.m. in the morning. It also involves the controversy about smoking and health.

Now, Mr. Barrett more or less indicates to you there is no controversy, that it's just a shut and closed issue or that there was no controversy back in the 1940s, 1950s and the early '60s leading up to the 1964 Surgeon General's report. And as all of you are aware, the Cigarette Labeling and Warning Act was passed by Congress, and starting on January 1, 1966, every manufacturer has been required to put a warning on their label, including on the advertisements, their billboards, anything you see. If you'll look at them and pay attention, it says, "Surgeon General's Warning." It's on there.

This gentleman, Mr. Smith, was a veteran, was a disabled veteran. And at the time of his death, there are some records in this medical record, and incidentally, this large document that you see here, which is the Court's Exhibit Number 1, is a medical record or medical chart, and it's being introduced in this lawsuit by the Court and by agreement of Mr. Barrett and me as the



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official documents that record, as you know they do, in hospitals and clinics what happened when it happened, as it happened, nurses' notes, doctors' notes, therapy notes, you know what I mean. All of you have either been in the hospital or had family members in the hospital, and you know they keep a chart or a record. That's it. It's big; it's voluminous.

Now, as I say, the lawsuit involves that controversy, as we say, in the '40s, '50s and '60s about smoking and health. At the time of Mr. Smith's death, he was 63 or 64 years old. I believe he was 63, but as I say, the records sometimes say 64. As the Court told you yesterday, and we agree, that Mr. Smith smoked our product, Pall Mall cigarettes, for many years, no question about that. That's a fact, both sides agree on that. That's one of the few things me and Mr. Barrett have agreed on in this lawsuit.

Mr. Smith liked our cigarettes or Pall Malls, he enjoyed them, he bought them, and we were happy to sell him our product. That's the business we're in. We're a legal business, we manufacture a legal product. And incidentally, if any of you want to be our customer, we'll be happy to sell you a cigarette. That's what we do.

The medical issue in this case -- and I know this is going to sound rather absurd to you -- is actually

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simple, and you know, death is never usually simple unless you're run over by a train or someone shoots you, you know, everyone knows how you die. The medical issue and the issue in this lawsuit is what caused Anderson Smith's death, not all this stuff about who knew what and when or about how long he smoked or what all problems he had or whether he had lung cancer or COPD.

The question that must be proven by the plaintiffs is what caused Mr. Smith's death. In other words, what was the "terminal event"? And you're going to hear that a lot of times in this lawsuit. What caused Mr. Smith's heart to stop beating? And we all know that, really, in the ultimate, the terminal event in anything of death is when the heart stops beating. You may have cancer, you may have urinary tract problems, you may have hypovolemia, you may have septicemia, you may have myocardial infarction, heart attack, but when the heart stops beating and that line on the monitor quits blipping and goes straight, you're pronounced dead. That's the terminal event.

The answer, even though this is a simple matter in this lawsuit, may, in a way, be difficult for you, but we're going to offer very credible, believable medical proof in our efforts as attorneys and working for our company to aid you in your search for the truth or the

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answer, and that's all we're entitled to is the truth.

That's all you're entitled to hear, not a lot of this bologna you've already heard, and we're going to show you is bologna as this lawsuit goes along. We're going to put on a truthful, believable case, and I predict you're going to believe it when you hear it because it's going to be so glaringly obvious, and when we get through, you're going to promptly go out to that jury room and vote on the liability issue, and when you vote on that one and vote there is no liability, the question of damages, compensatory damages, punitive damages is null and void, nil, it has nothing whatsoever to do with this lawsuit. You rap on the door, call the clerk, give us your verdict, and we'll all go home.

You will hear, as I said, "terminal event" and "immediate cause" many, many, many times. Mr. Barrett just informed you that he thinks he's going to put on evidence to show that Mr. Smith died from lung cancer and that that was caused by smoking, 40 years smoking a pack or so a day of Pall Mall cigarettes, that's exactly what he told you. Listen very carefully to the proof.

This case may not take two full weeks. We may be through with it early next week, may be a short case, like Mr. Barrett said. We're not going into a lot of things we usually do in these cases.

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As you listen carefully, and I'm really pleased to see that His Honor has chosen, this is unusual, in fact, to allow you to have note pads, take notes, good idea. I want you to listen carefully, and you will quickly perceive and quickly see the absence or lack of credible proof and credible evidence to support this claim. You will hear, as he said, Dr. David Burns, an internal medicine specialist from San Diego, and Dr. Richard Pollay, marketing professor at the University of British Columbia in Vancouver and, incidentally, two people who travel all over the world testifying against tobacco companies. They're professional witnesses against tobacco companies. They'll go anywhere any time, have bag will travel if they can say something bad about a tobacco company.

You're going to hear them here today and bad mouthing us as much as they can. But to prevail in this lawsuit -- incidentally, we've heard them do this several times before. I've taken their depositions, Mr. Sheffler has taken their depositions, they've been in Court with us, never have convinced anybody of their stuff, but they'll --

MR. BARRETT: Objection to that, Your Honor.

JUDGE BOGEN: That objection will be sustained. Let's just talk about this case.



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MR. UPSHAW: I agree with you, Your Honor. I shouldn't have said that. Thank you, Mr. Barrett.

MR. BARRETT: It's also not true.

MR. UPSHAW: I object to him making remarks, Your Honor.

MR. BARRETT: Counsel, I don't want --

MR. UPSHAW: Mr. Barrett has told you what he expects to prove and that is the gentleman died from lung cancer from smoking Pall Malls. To prevail or to win this lawsuit, the plaintiffs, and that includes all of these lawyers over here, they always talking about how many lawyers they got. They've probably got more than we've got. There's three of us, there's Mr. Clark sitting over here on the front row, he's also a lawyer in Greenwood, and he's for the plaintiffs in this case also. Mr. Scruggs is somewhere around here, I don't know where Dickie is, he's somewhere around here, but he's also another lawyer here for the plaintiff.

But anyway, they must show you that his lung cancer, and by "his", I mean Mr. Smith's lung cancer caused -- we're talking about causation, y'all heard that word a lot yesterday and the day before, the terminal event, again, I'm using that word, in other words, the passing away, the death.

Listen carefully to that proof, look at their

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exhibits. They absolutely will not give you convincing credible evidence on this issue because it simply is not available to them. They'd give it to you if they had it, and it's not proven.

Remember what you're going to hear. This is a sad story. This gentleman, Mr. Anderson Smith, had been in the Veterans Administration Hospital for 40 days, he went down there on December 23rd, he died in the early morning hours of February the 7th. When he died, and this is sad, it was early in the morning, he was alone, he was unattended, he died suddenly, he died unexpectedly, but, thank goodness, he apparently died without pain or without agony.

It was a surprise when the nurse went by and found Mr. Smith, and she did go by, Nurse Oliver, you will see from these records, went by at or around 5:00 o'clock on the morning of February the 7th, 1986. When she found him, he was still, he was beginning to get cold, he had no pulse, he had no respiration, he had no blood pressure, he had no heart beat.

That's serious, that's about as serious as it can get. She did what they do in hospitals. In some hospitals they call it different things, but in the Veterans Hospital they call it a "code blue." She called a code blue which is the emergency -- everybody get down

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here as quickly as you can. We've got a patient that's either dead or dying. Let's do what we can possibly do to resuscitate him and save him.

The code blue team, including a couple of doctors named Walker and McTurnon, these records will show you that morning, responded and frantically and heroically worked for over a half an hour, from 5:00 o'clock until -- actually the death certificate says he died at 5:30, he really died at 5:32 -- I'm not trying to be too technical, but that's an error on the death certificate that's so sanctified, according to Mr. Barrett. And we'll show you where death certificates are notoriously wrong, as birth certificates, as many of you know what I'm talking about.

How many of you have had to go back and get your birth certificate straightened out? Anyway, they tried, they were unsuccessful. He was pronounced dead according to the certificate, at 5:30, actually at 5:32 a.m., by Dr. McTurnon. The reason I say he died at 5:32 is because that's when the nurse's notes in C-1 here shows that CPR was stopped by Dr. McTurnon at 5:32 a.m. He told the nurses, "We'll give it up," and incidentally, they had been doing that since 5:22, they had done CPR for 10 minutes. Now, he was pronounced dead at that time, and the appropriate orders were issued to move him from the room to wherever he goes, and the family was notified, and

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then he was eventually taken back to Kosciusko for preparation and for burial.

Now, the plaintiffs want you to believe that that's the end of the story, that's it. He had lung cancer, he smoked our cigarettes, he died, and that's it, end of story, pay us some money. If it was that simple, we really wouldn't be here today, taking up a lot of your time -- and I don't mind telling you, a lot of our time -- because that is not how simple this story is. Causation, again, don't forget that word. Causation must be proven by the plaintiffs. It's not our job in this lawsuit, and by "our", I mean the Defendant's job in this lawsuit to prove what did or did not cause the terminal event, the death, the passing away of Anderson Smith, Jr., it is called the "burden of proof". The plaintiffs have that burden. The reason it's called a burden is because it's something you have to pick up, you have to tote, you have to carry it. We don't have to do that. Plaintiffs have to prove their lawsuit. If all you had to do was put a bunch of flowery phrases in a complaint and file it and say all these things and come in here and get money, there wouldn't be any need in defending lawsuits, it would be all over when Mr. Barrett got through with his opening statement.

It must be proven, it cannot be proven, that's



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their improbable burden in this lawsuit because it just didn't happen the way they contend it happened, and the way they're going to get Dr. Burns and Dr. O'Neal, this kindly looking gentleman I sit back here, and I think a lot of, they're going to get him to say it did happen that way. We're going to prove to you it didn't happen that way.

The records, and these are the records here, will reveal clearly that he was admitted to the VA Hospital, first admission, of course, he'd been there several times, but in this course that we're concerned with here, with the carcinoma or the squamous cell carcinoma or the mass or the lesion or the tumor, whatever you want to call it, or the cancer, if you will, the admission. He went down there, now, for urinary tract problems, that's what the records are going to show, he was having difficulty urinating. We all know what that is, but it simply means peeing, he was having difficulty in passing water. He went down there on October the 15th and was admitted, that's in 1985, with severe urinary tract problems, and you're going to hear "urinary tract problems" through this lawsuit quite a bit.

While in this hospital and during a routine chest x-ray, a mass was revealed, a spot, if you will, you've had -- you've had that happen to family members or

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others, you know what I'm talking about, "Oh, my goodness, there's a spot in my lungs." And they did not actually, definitively diagnose or determine what that mass or what that spot was until three full months later on January the 15th, 1986 when they did a fiber optic bronchoscopy on this gentleman. That is where they ran a tube down his throat, went over into the lung, took a little piece of that thing out, they visualized the rest of the lung while they were at it, it was all clear and looked good, took a little piece of this mass, this tumor out, brought it back, sent it to the laboratory, had it typed, and then came up with a definitive diagnosis of carcinoma which is a big medical word for cancer, and the type they put on it was squamous cell carcinoma.

Now, contrary to what the plaintiffs say, the overwhelming evidence in this case that you will see and here will convince you, and we admit that he had lung cancer, but the overwhelming evidence in this case that you will see and hear will convince you that he died not from the lung cancer but from other unrelated causes as, many people do.

The plaintiffs are not going to be able to, as it's their burden, to show you that Mr. Smith's lung cancer caused the terminal event -- that caused the event that caused him to pass away suddenly and unexpectedly as

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I've described to you at 5:32 a.m., on February the 7th, 1986. The evidence in this lawsuit, the credible evidence, the believable evidence in this lawsuit will clearly establish that this gentleman, this veteran, this disabled veteran suffered throughout most of his life from reoccurring, severe urinary tract diseases and infections. These diseases and infections, ladies and gentlemen, ultimately led to his passing away, not his lung cancer, and we're going to show you that as clear as a bell. I'm not a doctor. I've had to be shown, and I'm -- I've been to school on this thing, and we're going to teach a little class on that here today so you people will understand as I understand, all of you jurors understand.

Mr. Barrett told you that he expects to prove that prior to 1964, and this is where he's getting into what he calls "punitives", prior to the '64 Surgeon General's report concerning smoking and health, that The American Tobacco Company had actual knowledge about the alleged health risks that were associated with smoking and health, and we kept that a secret. I jotted down here a couple of things he said a moment ago. "Many years of deceiving the public, punitive case, blah, blah blah," he said all those things. Mr. McTeer, if you recall, yesterday, and you will remember this, told you yesterday, "Since 1953, American Tobacco Company has known

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cigarettes cause lung cancer and have tried to hide or conceal that knowledge," you remember that? I think you do remember that. He did say that. I submit to you that he did say that. And he and Mr. Barrett want you to punish us because of his unsupported, unproven statements that they made, and it will not be proven because they cannot produce credible, believable evidence to support that position.

Mr. Barrett a moment ago said we've known this for 40 years, he accused us of lying, he says we continue to lie, secret, big secret, he used all those words. Y'all watch this as we go through this lawsuit. In other words, they clearly claim that American Tobacco Company has secret information. Now, you listen to the evidence and listen whether there was anything about smoking and health, smoking and lung cancer that we knew before 1966 that wasn't common general public knowledge. We didn't know anything that everybody else didn't know, and certainly we didn't know anything that the medical and scientific community didn't know.

We're not a medical -- we're not a scientific organization. We have to rely on scientists, laboratory scientists and physicians. They have searched our files. He said they would show you internal documents of ours. They've searched our files. We were required to give them



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our files. We gave them about a hundred thousand papers been generated over the last 60 or 70 years, boxes after boxes of our files, and they spent weeks combing through them. Listen whether they've actually got a single piece of information that comes from our files about smoking and lung cancer, that is, in fact, a "secret". They don't have it. Listen to whether there is some secret research that American Tobacco Company did. Didn't happen. They have to prove this to you, that we had secret information about --

MR. BARRETT: If it please the Court, we object to that. That's not the law. That's not our case.

JUDGE BOGEN: I'm going to overrule the objection. Counsel may continue with his statement.

MR. UPSHAW: They have to prove to you, ladies and gentlemen, that we had secret information concerning smoking and health that the public didn't have for them to even be allowed to mention punitive damages. See if they can prove we had secret information. See if they can prove what the secret was. That's the issue, one of the issues, another one you've got -- you may not have to decide that, because when you go back there and find that there's no liability, all of this is moot, all this is what you forget. But it may be an issue you have to

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decide, was there a secret, if there was no secret, then there's no such thing as punitive damages in this case.

Our proof will show that beginning in the 1950s, there was a raging scientific and medical controversy over this exact question: Does smoking cause lung cancer? Incidentally, I'm old enough to remember that. I graduated high school in '49, so I was around at that time. I hate to tell y'all that. But anyway, our proof is further going to show that that controversy took place openly and in the public. It was big news. Newspapers love -- we've got reporters all over this place now, and they love to print things like this. I mean, if they can print something that -- that's big news, that smoking caused lung cancer, can you imagine a bigger news story in the'50s or'40s or'60s? They were printing it everyday. They went blazing it across headlines, it was a bomb shell, even for some scientists to start to suggest this.

We have acted -- let me just say this: The scientists on both sides of the controversy -- and there were many, many prominent, believable, honorable men of character and integrity in the scientific and medical community who were on both sides. Some of them said it had been proven, some of them said it hadn't been proven. Because of this incrediblely strong controversy in the

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scientific and medical community, we feel we acted -- we're a manufacturer. Why should we have stopped making our product? No one had proven anything yet. They were just scientists saying we believe this, and there were other scientists saying that hadn't been proven.

It's not true, so our proof is going to show we acted reasonably in believing the product had not been proven injurious to your health until it was actually proven scientifically, not just what some guy that counts numbers and goes out, that's what they call "epidemiology" is -- it wasn't a very well-respected science back at this time. Nowadays, it's more accepted, but it's a counter, a that would count. I guess it's well if they are doctors, but you go out and take a hundred thousand people over here who smoke and a hundred thousands people over here who don't smoke and how many diseases these have got, and see how many diseases these have got, and you hopefully think you've proven an association. These have got more than these have got, and therefore there's an association. You see what I mean, that's not causation.

It wasn't until 1964 when the Surgeon General finally said we'll call it that. They had to redefine the word "cause" to do that. Since 1964, they've called it cause. We're talking about punishing us, or at least they're talking about it, back when causation, we contend,

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was not proven. Contrary to what Mr. Barrett says, we've really never told anyone that smoking does not cause lung cancer, absolutely positively, we've never said that. We've said that we don't believe it's been scientifically proven, of using time-tested laboratory experiment methods as most scientific method as they used to call it. There's not a witness in this lawsuit that will tell you we have said that just like that, not even the plaintiff's witnesses will tell you that.

Now, every charge that Mr. Barrett made against us is public public knowledge, listen to the evidence, they won't show you incredible evidence or anything that was not known or disseminated and spread among the public. Some doctors said, "Yes, we're talking about the'40s and '50s," some doctors said "no". That's what you call a controversy, very simple.

Accordingly, it's very clear that American Tobacco Company withheld -- withheld nothing. For example, one of the Plaintiff's witnesses, Dr. Richard Pollay, sitting on the third row here, tan suit, tie, brown tie, he's the gentleman from Vancouver, British Columbia. He testified under oath before, ladies and gentlemen, that he -- and he's their marketing expert, he's the guy that's going to tell you what all we have told everybody, what we've kept a big lie. He's not



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aware, as he's testified under oath before, of any information regarding smoking and health of any information the tobacco company had in the'40s and '50s and'60s that the scientific or medical community did not have, or at any other time since then, and that's a deposition under oath that we took from him March the 2nd, 1993, this year up in Vancouver.

Another plaintiff witness is Dr. David Burns. He's setting out here on the second row, next guy from the end in the blue suit. He's the gentleman that Mr. Barrett told you worked on Surgeon General's report, world's greatest expert on this, world's greatest expert on that, smoking and health. Anyway, Dr. Burns is from San Diego, California, and he's already testified under oath, under the same oath that he'll be under here today that he actually has no knowledge about what information American Tobacco Company had, and he also has testified under oath that he has no knowledge that we withheld information on smoking and health, and that's in a deposition we took out in San Diego on December 1st, 1992. That's what's going to be their proof of our bad conduct, of our secrets, of our lies. You're not going to believe it because it really didn't happen.

Our proof, on the other hand, is going to show that throughout the '40s and '50s, and up to the issuance

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of the '64 Surgeon General's report, there was a large body or at least a body of scientific evidence that was developed, science is ongoing, and it was developing that led some researchers, some scientists and some doctors, and they were honorable people, to believe that there was an increased risk of lung cancer associated with cigarette smoking.

In all candor, there's no question. That's what caused the controversy. They were men of integrity, science, preeminent doctors, physicians, researchers, scientists who had begun to come, or thought they had begun to come to that conclusion and all that was being published. The proof will show very clearly that as that evidence developed, as these researchers developed, it very quickly found its way into the public domain. It did that quickly and effectively or was spread or disseminated to the public by the public media, that is radio, newspapers, TV, magazines.

TV was kind of in its infancy back then, but everybody back then, when I was a boy, was listening to the radio, everybody back then read newspapers, read magazines. Now, we just look at the tube. I think it's to our detriment. I think it was better when we used to have to read a little bit.

But anyway, the proof will also demonstrate

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that throughout the '40s, '50s and '60s -- early '60s, that is, there was a raging, serious controversy in the medical and scientific community about whether science and/or medicine had actually established that smoking caused lung cancer. All of these signs on both sides of this controversy had the same information.

I mean, if you're working on one side of it, and I'm working on the other side of it, you're in your lab, I'm in my lab, we share information. You've got your information, I've got my information, everybody has the same information. But, as will happen, they drew different conclusions from the same information about the question of causation. People had been smoking, I guess we had, since Sir Walter Raleigh came over here and an Indian met him on the shores and handed him some tobacco and he took it back to Queen Elizabeth.

We've been smoking a long time in this country. Some researchers, in all candor, in all honestly, some honorable researchers believed back then that they had established cause, and they heralded that every way they could publicly. They didn't hide it. They didn't keep it a secret. And let me assure you, the press, the media, the radio people didn't hide it, either. They trumpeted it all over this country. It was news, it was big news.

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However, adhering to time-honored scientific methods of proof of cause -- and that's what a lot of honorable scientists believe you have to do, you can't just count and do this, there is a honored, a time-honored way to go into the laboratory, and you take controls, and you take mice here and mice here, and you put it on these, put it on these, you make these, smoke or breathe tobacco smoke, these don't, and you try to create lung cancer.

They tried and tried and tried, but there were many prominent scientists adhering to the time-honored scientific method, many prominent scientists, doctors and researchers who believed very strongly, and a lot of these people belonged to the American Cancer Society in the '50s. One of them was even the Surgeon General of the United States in the '50s when we were supposed to know everything. We're going to show you that the Surgeon General of the United States said it hadn't been proven. And he, as a matter of fact, recommended to us that we not put warnings on our cigarette packages in the '50s. We're going to show you that.

Anyway, many prominent scientists, doctors, surgeons, physicians, surgeons believed strongly, very strongly, because they had scientific integrity, and most scientists should have, that cause had not been proven and lots more research was necessary and required. They were



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working on it. The medical and scientific community simply was not, or the evidence was simply not strong enough to establish or form a reliable scientific judgment of cause during that period, and we'll prove that to you as clearly as a bell.

The Surgeon General, as we've told you, of the United States, our top medical officer, eventually did determine in his mind and from a scientific advisory committee that was formed in 1962, but in '64, he determined that there was sufficient evidence. He used these epidemiological studies and redefined the word "cause", but he did decide, because there was such a hullabaloo being raised about it, that something needed to be done, that causation had been established as of 1964, Surgeon General's report.

Now, most importantly, ladies and gentlemen, the proof will convince you that while The American Tobacco Company kept totally abreast, up with the scientific developments as we should have, there's absolutely no evidence whatsoever that American Tobacco Company knew anything about smoking and health that was knowable but unknown to the medical scientific community or to the general public, and thus, ladies and gentlemen, there's going to be no evidence in this case that we secreted or we withheld information about this critical

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issue that should have been put out. There were no secrets, there was no secret research. It's that simple. It's all in the public domain.

Our proof will show that public health officials, and I've already mentioned enthusiasm, but it's in order here, the Surgeon General acknowledged, the Surgeon General of the United States acknowledged in the '50s that the relationship between smoking and health, and lung cancer was controversial, and he acknowledged that well-known, eminent scientists had differences of opinion about this issue. The Surgeon General, himself, as I've told you, acknowledged that this controversy over smoking and health, and our proof will show that the Surgeon General didn't think that there was any secret information being withheld from the public as they contend. The top health official in the United States didn't believe that, didn't say that, and they're not going to be able to prove he did.

Now, here's where the Surgeon General -- I want to talk about the warnings. The Surgeon General in the '50s thought that all information concerning smoking and health had been conveyed to the public. As a matter of fact, some people thought at that time that the public was more aware or more scared of smoking and thought it was worse than the scientific community did, a much

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greater percentage of the general public. You don't have to be a doctor to be afraid of something, and doctors sometimes think they know everything, and they're not as afraid of something as me and you would be. We're the general public.

But our proof is going to show that our top public health official in the United States, our top public health officer, the Surgeon General, recommended that the tobacco companies not -- not that we put warnings on cigarettes -- as Mr. Barrett says how bad we are for not warning people. He recommended that we not put warning labels on cigarette packages in the 1950s. He thought, the Surgeon General of the United States, that at that time, there just wasn't enough knowledge, there wasn't enough known about the relationship between smoking and lung cancer to require a warning, and he thought -- the Surgeon General said this. We'll show you that, that the public had been told at that time, during this era, the '40s and '50s and early '60s, that the public had been told all there was to know, exactly what -- that's the truth. He was right.

Now, you're going to be convinced, after you hear all of this, that there's no reason at all for you to even consider thinking about punishing my client for legally -- we're not an illegal company -- for legally

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manufacturing and selling our product, Pall Mall cigarettes. Mr. Barrett's opening tirade against us was a smoke screen attempting to inflame you against us, make you think that we were just killing people. He named every disease known to man, that we killed more people than all of them, but it fails for lack of proof. He will not prove this with the witnesses that he has in this courtroom today.

Now, let's get to the urinary problems that we're talking about. Let's quit talking about what people knew or didn't know. Let's start talking about Mr. Anderson Smith. That's the critical issue in this lawsuit. He had a lifetime urinary problem, ladies and gentlemen, that eventually led to his death. We're going to give you a road map, credible, believable medical proof that will show you exactly how he did it. The evidence will show that beginning around 1938 until he passed away in 1986, which was 48 years -- and this is bad, because I'm sure it was a painful 48 years, but he suffered from urinary tract diseases and infections.

He was in and out of hospitals and doctors' offices, time after time after time, and we've got records there. We don't have them all. He suffered from bladder obstruction, and he suffered from other kidney and related diseases. And when these doctors are talking about



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picture of it. We think we know what it is, but we're not sure. Let us run this tube down, let us get over there and get a little piece of it, we'll send it to the laboratory. We'll definitively diagnose this. You may have a tumor that's not malignant, but it may be. Let's do it." He refused that. He told them that he didn't feel like doing it that way, that day, and he was discharged to go back home, and he said something about having family problems at home. I don't know what that was, and it's not important.

Anyway, he left the hospital, it's not important at all. He left the hospital telling them he'd be back in 10 days to two weeks. He did get back close to that. He got back December the 23rd, which was what, 18 days, that's just a little bit over two weeks. They admitted him again, and this is his last admission. He stayed there 40 days from December the 12th to February the 7th, 40 days. He was admitted for possible cancer. They thought -- they knew he had the spot there, wasn't any question about it, admit it was there. It was there, it showed up, and they also hospitalized him for treatment of his severe urinary problems at that time.

This infectious disease physician, Dr. Reinarz from the University of Texas, will explain to you that Mr. Smith's repeated urinary infections and problems had a

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cumulative or a piling up effect, if you understand, it's like make being a sand bar on the river, you know, it keeps piling up and piling up and piling up. Each time one of these infections or diseases would reoccur, there would be more scarring in the tissue which made the next episode or the next blockage of the urinary system more severe, a greater problem and more painful and more difficult to treat, so they were going to see what they could do about it.

They knew this problem was there, and frankly, I think they were kind of glad to have him down there in the hospital where they could have him under their control and try to do something about this that they had been trying to do for years.

These records right here are going to demonstrate that during this final hospitalization in the VA Hospital, those 40 days that I've told you about, the VA physicians, including the medical students who come over there, the residents and the medical students from the University of Mississippi Hospital who train, spent a great deal of time, a considerable amount of time and effort trying to diagnose, definitively diagnose and treat these urinary problems. He hadn't allowed them to do a cystoscope on that, either. I mean, you know, they wanted to go up in his penis.

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MR. BARRETT: May it please the Court, may we approach the bench?

THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH OUTSIDE THE HEARING OF THE JURY:

MR. BARRETT: Mr. Upshaw can't say anything about the man's ability, his incompetence.

MR. UPSHAW: I'm not saying anything.

MR. BARRETT: Yeah, but you're opening the door wide open for us to tell this jury why he did this or did that. That's grossly unfair. It's abusing what the Court's done.

MR. UPSHAW: I'm saying they wanted to do a bronchoscopy on -- cystoscopy on him. They did it on him eventually.

JUDGE BOGEN: Well --

MR. BARRETT: He said three times now that he refused. Why --

MR. UPSHAW: Okay. Okay. I won't say he refused any more. I can't imagine what --

JUDGE BOGEN: Okay. All right. Let's proceed.

THE FOLLOWING PROCEEDINGS WERE HELD IN THE PRESENCE OF THE JURY:

MR. UPSHAW: I think I ended by saying they spent a great deal of time and effort trying to diagnose

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the urinary disease. Of course, he's in the hospital, and the major diagnosis, at least they thought it was at that time, was lung cancer. They hadn't definitively diagnosed it yet. That's what they believed it was, and proof will show that if you go in the hospital with lung cancer and urinary problems or a broken leg, the major diagnosis is going to be lung cancer, the next one may be the broken leg and the next one may be the urinary problems, who knows, but lung cancer, of course, is serious and is always a major diagnosis.

The mass that was discovered on October the 15th in 1985 was eventually definitively diagnosed by FOB, that's another medical abbreviation which means fiber-optic bronchoscopy. This is up the urinary tract, not down the throat, almost the same thing as the bronchoscope, they scope you up your urinary tract as they scope you down your throat.

They did that on January the 15th, these records will clearly reveal, in '86, -- no, the bronchoscopy, I'm wrong, I hadn't got to the cystoscope yet. The bronchoscopy was down the throat. They did that on the 15th, and they definitively diagnosed lung cancer, is was what they thought it was, but they typed it at this time. They got a piece of it, took it to the lab to see if it was adenocarcinoma, to see if it was giant cell



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carcinoma or squamous cell carcinoma or what, and it was diagnosed as being squamous cell carcinoma.

They also eventually started radiation therapy, this is after the 15th of January, on the 27th day of January, and they were going to give him, according to these records, 500 rads of radiation, and they had that scheduled over a five-and-a-half week period, and they began that -- remember this, these are important dates, January the 27th, we'll show you.

He remained hospitalized for evaluation and treatment of his urinary tract infection disease, not his lung cancer. The records are going to show you that they took him off of his respiratory medication for his respiratory problems on the 27th of January, 1986. When he eventually died, seven or eight or ten days later, he wasn't really even being treated for respiratory problems. He was being given radiation treatments, the rads, but I'm talking about the medicine. We're going to put the physicians on to tell you that that does not indicate respiratory distress because he was not in respiratory distress on February 7th, 1986.

We're going to put on proof that during this period of time between the diagnosis of the lung cancer and his death, which was about 16, 17 -- what is that, 23 days, the 15th to the 7th, they had him going to the

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dentist, they had him consulting a dietician about when he got home about his diet, how he should eat and take care of himself. They had doctors recommending that they get him to physical therapy.

Our doctors are going to say that's not a patient in the terminal phase of lung cancer, a fellow that you're sending to the dentist or even treating a urinary tract problem. If he's in a terminal phase of lung cancer, why do all these other things, you know, unless you want to just punish a man. Does that indicate respiratory problems? Our doctors will say, "Of course not."

Clearly, ladies and gentlemen, this tumor, this squamous cell carcinoma, this cancer, whatever you want to call it, he would have been treated as an outpatient. He wouldn't have been in the hospital in the stage or the phase that it was actually in in February or January when he passed away, and he wouldn't have been in the VA Hospital as an inpatient if he hadn't of had the serious urinary tract infections and diseases, including, it was eventually discovered, bladder and prostate tumors up in his bladder and in his prostate, plus all these problems he was having.

These physicians from Texas will explain that the records clearly show that the VA physicians thought

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that he also had cancer, as I say early on, cancer of both bladder and prostate, I guess that's the way it's pronounced now, and they scheduled and eventually did a cystoscopic examination, a cystoscope, which is similar, I got ahead of myself awhile ago. Like the one they run down your throat, they run it up your penis, if you will, your urethra, where you make water, and ran it up there to visualize, maybe take a piece, maybe take a biopsy of whatever they found up in there.

They tried this procedure, but they had to stop it because Mr. Smith -- they gave him a topical anesthesia at this time. Incidentally, back when they did this bronchoscope, they gave him a general anesthesia. This is a man who they say is in terminal phase of respiratory problems, and 15, 23 days before he passes away, they're giving him general anesthesia, he had good enough, strong enough lungs to withstand general anesthesia.

This first cystoscopy that they tried on the 29th, they did it under a topical, not a saddle block, but they used anesthesia and they painted it on, and they put some on the tube, and they attempted to do it. And to be perfectly frank with you, can you imagine yourself, how painful that had to be, and Mr. Smith didn't cooperate, and I don't blame him, I wouldn't have, either. But he

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thrashed around while they were trying to do it, and, in effect, jerked the scope out. It was unsuccessful, that procedure was, on January 29th.

And who knows, we don't know, maybe that was the genesis, maybe that was the beginning of the emboli -- and that's another word you're going to hear a lot, emboli, that means clot. That's another big doctor's word, nothing more or less than a clot. But maybe that was the genesis or the beginning of the clot that happened, and we're going to prove and killed this gentleman in the early morning hours of February the 7th. They scheduled and tried a second cystoscope exam, a second cystoscopy on February 4th, 1986. They did this exam, but they did it under general anesthesia, less than three days before they found him passed away, about 70 hours, if you read the chart, less than three days.

Here's a man that they would have you believe that is in such dire straits respiratory wise, he's wasting away, he's dying, lung cancer is killing him, he's not going to make it. You've seen patients like that with tubes in their nose and down their throat, they're feeding them, giving them oxygen, got them on CPAP, continuous positive air pressure in their nose. I saw my mama like that, I've seen people like that.

But anyway, here's a guy that less than three



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days before his death they've taken him off of the medication for his respiratory problems, they're building him up, they're recommending diet changes, they're recommending therapy, physical therapy, for him, and they gave him general anesthesia. What an insult to the lungs that is. He withstood it well; he had no problems with it.

During this procedure, while he was under the general anesthesia, they took a biopsy, which is nothing more than just chunks of tissue. From the tumors that they visualized at this time, they can see through that thing, it's like a little television camera, and they visualized tumors that they thought they were tumors anyway, they were masses that weren't supposed to be there. You know, all tumors are not malignant, I'm not saying they were malignant tumors, but they visualized the masses or tumors in the prostate and in the trigone of the bladder. I'm going to show you pictures in a minute, talk about another doctor to show you exactly what we're talking about.

Because of the problems during this surgical procedure that he had with excessive bleeding, he started bleeding profusely, also his blood pressure dropped, that scared them a little bit during this procedure. They were unable to really continue visualizing and to continue to

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see what they wanted to see, and they wanted to stay in there a little bit longer. But due to a blood pressure drop and continued blocked vision because of bleeding, they just decided to go on and get a chunk of this and get a chunk of that in the prostate and bladder and get out of there, which is the smart thing, what they should have done, and it ended up making no difference because less than three days later, the gentleman passed away, but it did confirm tumors in the prostate and the bladder.

After this surgery, he experienced quite a bit of bleeding such that they inserted a catheter up his penis. All of you know what a catheter is. The records over here reflect that the bleeding eventually slowed and began to decrease enough to let the doctors recommend removal of the catheter on February the 6th, an important date. They removed the catheter, and a few hours later, a blood clot, a pulmonary embolus, found not breathing, no pulse, no respiration, not breathing at 5:30 in the morning, dead.

I'm not saying the doctors did anything wrong. They did just exactly what they should have done. The doctor said, "Remove this catheter." One of the reasons they removed it, they wanted to get him up, get him on his feet, get him moving around, "ambulate", the doctors called it, me and you call it walking around.

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They wanted him ambulated. Why? Why did they want him ambulated? They recognized the danger of the sedentary style, bedridden style, the inactivity of causing clotting of the blood that causes blood clots and pulmonary embolisms.

You're going to hear from Dr. Reinarz that if you go to the hospital and have your gallbladder taken out, 40 years ago they might have kept you in bed two weeks. Nowadays, no matter how much you hurt, we see you up walking up and down the hall, somebody assisting you, the reason for that is the well-recognized risk of a pulmonary embolism, an emboli, an emboli, a clot developing, breaking loose, traveling up the veins to the pulmonary artery, shutting it off and killing you. They ambulate you as quickly as possible, and the doctor ordered here to, "Get Mr. Smith up and ambulate him."

It never happened because tomorrow really never came. Mr. Smith passed away beginning at 5:00 and ending at 5:32 a.m. The following morning. This doctor will tell you that that's the reason he never ambulated. When they found him, his heart had stopped. They tried, they couldn't get it started beating again, and Mr. Smith's death, as I've told you many times, was suddenly and totally, totally, totally a shock. It was totally unexpected by his doctors.

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You know in a cancer patient, the proof will show that wasting away and slowly but surely dying, there's nothing you can do with them but make them comfortable, give them narcotics and wait for the time to come. That's not unexpected, that's not a surprise when that death comes. Most everyone has had that happen with a family or with a friend. They were shocked, they were surprised, and Dr. Reinarz will tell you that there was no autopsy in this case. By the way, that if there had been an autopsy in this case, we probably, most probably would have a conclusive answer for the principal question we're talking about, cause of death, and the answer most probably, most likely would be pulmonary embolism from the urinary area following this urinary tract surgery, this removal of the catheter. 70 hours later, before he can get up and start walking, the gentleman is found passed away.

Based on his training and experience and things thorough review of the medical records, Reinarz will tell you that the terminal event, we talk about that again, was a heart attack, but that's when the heart stops. You know, something's got to happen to your heart, like I said early on, before you really die, but it was most probably that heart attack. That heart stoppage was most probably caused or most likely caused by this emboli,



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this embolism that traveled up that vein and got there, and that's painless, you don't even know that's there.

He will tell you that he can't rule out septicemia, which is another big medical word for overwhelming infection, for all the infections he had. He's not ruling that out. Dr. Reinarz also will not rule out myocardial infarction, which is another term for heart attack, which is another cause of the heart attack, but again, he'll go back and say the most probable, the most likely cause is pulmonary embolism, second may be septicemia, third may be myocardial infarction.

He will explain each of these probable or participating causes of death are all clearly secondary to and a result of the urinary problems, have nothing whatsoever to do with his respiratory, COPD, or his lung cancer, nothing whatsoever to do with it.

Reinarz will tell you that in his -- that in his opinion, neither Mr. Smith's lung cancer nor his COPD caused, contributed in any way to his death. Death is far more likely and far more probable to have been caused by the urinary diseases and treatment -- the treatment of it causing the clot, it broke loose, traveled up the vein, lodged at the pulmonary artery, stopped the flow of blood, that made the heart stop, that caused sudden death. And frankly, as I explained to you earlier, he was alone, he

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couldn't push a button over here and call the nurses because it's sudden and unexpected. It happened just like that.

Now, the next doctor we're going to call is an internal medicine specialist from over at Columbus who really has a preference for and kind of leans his training or his practice toward pulmonary medicine, toward diseases and problems that you've got, COPD, up in this area. His name is Gregory R. Nunez. He's a board-certified internal medicine specialist. He's from Trinidad, of all places, but he's from Trinidad, but since becoming a doctor and an internal medicine specialist, and he trained -- got his undergraduate degree, and we'll prove, at Brooklyn College, medical training degree at Howard University in Washington, he's developed a real keen interest in pulmonary medicine, medicine that actual deals with diseases of the chest, the lungs, and the respiratory system.

He's not a pulmonologist, but he's an internal medicine physician who has a particular keen interest and devotes a lot of his time to pulmonary problems. Do you understand what I'm saying? He'll give you a detailed description of how a pulmonary embolism develops, moves up the vein and causes death, and he will show you with demonstrative aids, and I'm going to show you a few of

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these myself right now, we will so use some of these demonstrative aids. These are not exhibits, these are merely schematic drawings that we've had prepared for us that we hope will help you in seeing that as these physicians testify, they'll get down and they'll show you exactly what we're talking about.

Can all of you see this? Believe it or not, that's what we look like inside. But anyway, this is a normal looking bladder, urinary tract. There's his penis, there's the prostate, and here is the bladder. This is normal, this is the way I hope we all are. If we are, we're in good shape with our urinary tract.

These are the veins, blood vessels, the vena cava takes the blood back to the heart. Veins take it to the heart, arteries take it away from the heart. When the veins get it back there, it pumps it through the pulmonary artery into a lung, it gets cleaned up, picks up some oxygen, comes back, gets in the arteries and starts its trip again, right on down through. That's the way blood works.

This is the normal bladder here just like that one, but it's got a cut-away so you can see the inside of it. This is the trigone of the bladder, and you'll hear about that. It's kind of triangular shaped. This, again, is the prostate. These tubes that you see coming here --

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and I have the hardest time pronouncing those tubes, I want to say urethra, but it's -- ureter, ureter tubes. These tubes are what comes from the kidneys after the kidneys have done their job down to the bladder, the bladder gets full of urine, you expel it out here.

Now, this is, in effect, from the medical records, a picture of Mr. Anderson Smith's urinary tract system. After the bronchoscopy less than three days before his passing away, his death, but during the bronchoscopy, they were able to visualize a tumor in the trigone, you see what I'm talking about? And they were also able to visualize a small tumor in the prostate, and before the bleeding got too massive, causing them to have to withdraw and quit, then the ureters coming down from the kidneys were blocked off, one of them entirely, the other one partially, and they had already tried an IVP, which is an intravenous pyelogram, which runs dye down through there, and it hadn't made it. He was having a lot of trouble with these swollen, inflamed, and scarred ureters, trying to get the urine into the bladder to start with for the bladder to expel it, where you void yourself. It's a terrible problem, very painful.

Now, these other three just progressively show you what we're talking about: This Dr. Nunez will show you -- excuse me, I didn't know I was in front of you.



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This is nothing but a vein, obviously greatly magnified, but this is a blood vein that runs up. The depiction here is to show you the flow of the blood is coming this way, coming up toward the heart. This little blob you see right here is an emboli, don't forget, clot, what we was talking about awhile ago, is beginning to develop because of some infections or something that's causing it to do it in the system.

As it clots a little more, a day or two later after the surgery, it's gotten big. It's almost shut the vein off, and frequently, as doctors know, it breaks loose and begins to travel, and it's on a highway and can't get-- highway it can't get off of. It's a vein. It's an encapsulated tube, and it goes and it goes and it goes and it goes, and it eventually -- that thing is a little bit too wide up there.

It eventually ends up here, the trigone. The bladder, ureters, kidneys would be right up here, these go right up here. The pelvic bones, your hips, see what I'm talking about? It comes out of here, it gets in the inferior vena cava, which is a vein. This is a common iliac vein that comes down, the hips are called the iliacs, these bones, you know your bladder and cervix is stationed and set right in the middle of it, and that's where you keep your water, your urine. And these -- you

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saw the -- had it up here while ago, it has veins and blood vessels all over it that pour this blood as it's been used, as the oxygen has been used, it pours it back into the common iliac vein into the inferior vena cava, and starts its journey up to the heart to get itself pumped into the lungs, reoxygenized, pumped back into the heart and start its trip again down the arteries. Remember that. The veins come to the heart, arteries go away from it. I hope I do better than this when we get to trial, but I'll have somebody helping me maybe then.

JUDGE BOGEN: Mr. Upshaw, you've got just over five minutes left.

MR. UPSHAW: Sir?

JUDGE BOGEN: You've got just over five minutes left.

MR. UPSHAW: This is the vein coming into the heart. As it gets to the heart, this is the right ventricle, it pumps it up, and this is the pulmonary trunk or the pulmonary artery, it pumps it into the lungs, pumps it into the lungs, back in, back into the heart, good blood, out it comes. This is where the emboli lodges. When it does, that's where it causes heart stoppage, that's where it kills you, and that's what happened in this case.

And by the way, ladies and gentlemen, let me

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hurry a little bit. Maybe I've been going too slow, but I've been trying to show you as thoroughly as I could that the risk factors for that are age, the risk factors for that are bedridden, the risk factors for that are -- one of them is hypercoagulability of the blood. He didn't have that.

We have Dr. Thomas G. Barnes, he's a surgeon here in town. He will explain, no question in his mind, that that was what caused this gentleman's demise or his death. The death certificate does show squamous cell carcinoma. Dr. Burns and Dr. O'Neal, their witnesses, are going to rely heavily on this death certificate. We will show you that death certificates are notoriously inaccurate, and we will explain why. They're administrative tools, they're statistical devices, and Mr. Barrett told you, I really want you to look at this on this record, so he would show you hands-on loving treatment he got from Dr. Holly, who pronounced him dead.

The record is going to show Dr. Holly never laid eyes on him, wasn't there, didn't pronounce him dead even though he's on that death certificate, called the family, called Mr. Ball, "May we have an autopsy?" "No," that's how accurate this death certificate is. Dr. Dreiling, so caring and treating physician, his name is mentioned four times in that entire record, never

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treated him, never saw him. Dreiling had nothing whatsoever to do other than sitting on the Tumor Board one day and deciding that we shouldn't resection this lung, that he's not a candidate for resection. Holly has in there one time, two times, he ordered Dr. Jennifer Turner to write the discharge summary, and Dr. Dreiling listed him as the person who pronounced the man dead. He didn't even put that on there. He had never seen Anderson Smith in his life.

Dreiling appears four times, a hematology consult. He didn't see him on that, signed the Tumor Board decision, didn't see him on that, cosigned the discharge summary, hadn't been to see him, wouldn't have seen him on that, and he signed the death certificate. That's all that loving, tender care that these physicians have made out this death certificate.

You're going to see they have no connection whatsoever with Anderson Smith. They have no idea about the actual cause of death. They merely looked in the chart, Dr. Dreiling did, and took the major diagnosis, lung cancer. "It's good enough, put it on there, forget it." The death certificate is totally inaccurate. We'll bring Dr. David Sansing, who's -- his attorney, who will tell you about what was known and what was not known and who was reporting what to whom and who was making secrets



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and who was hiding stuff or not hiding stuff in the '40s, '50s or '60s. As you see, I'm having to hurry up because the Judge is on my back.

But anyway, we summarize this case, and we're confident that when you do retire and render a verdict, you're going to be convinced that the preponderance of the evidence -- and that means the evidence that tips the scales, as Mr. McTeer told you the other day, it doesn't have to be beyond a shadow of a doubt, just a preponderance, 51 percent. Actually, frankly, we think it's overwhelming evidence shows the most likely most prominent cause of this event, this death, this passing away of Mr. Smith passing away of life is clearly pulmonary embolism.

You're going to conclude that lung cancer and emphysema had nothing whatsoever to do with his death. He died with it, not from him, as many people do. If I've got lung cancer and go out here and get run over by a car, what killed me? Not my lung cancer, something totally unrelated to the lung cancer, urinary tract, pulmonary embolism, nothing to do with lung cancer. He had lung cancer, he died, he did not die from lung cancer.

Ladies and gentlemen, when this is all over and you're going to return a verdict for the defendants, you're going to realize in the jury room that there's no

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need whatsoever to even consider the evidence about the history of smoking and health controversy that I've used so much of my time talking about, punitive damages, because if there ain't no damages, if there ain't no liability, then it's not something you can talk about. Thank you. I appreciate it.

JUDGE BOGEN: All right. Ladies and gentlemen, we've gone longer with opening statements than I had anticipated and haven't gotten your morning break, and I'm going to give you a break now. And about the time we return, we'll be getting close to the lunch hour, and we'll break for lunch now, and I'll ask you to be back in the jury room by 1:00 o'clock, and we'll begin at 1:00 o'clock. We'll be in recess until then. Thank you very much.

(A lunch break was taken.)



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